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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION, An Illinois Not-For-Profit Corporation

Petitioner

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Respondent

MEDUSA CORPORATION
NORTHWESTERN STATES PORTLAND CEMENT CO.

Intervenors

BRIEF AMICUS CURIAE OF THE AMERICAN IRON AND STEEL INSTITUTE IN SUPPORT OF THE PETITION OF THE PORTLAND CEMENT ASSOCIATION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMERICAN IRON AND STEEL INSTITUTE

The American Iron and Steel Institute ("the Institute") is a non-profit trade association incorporated under the laws of the State of New York with

principle offices at 1000 16th Street, N.W., Washington, D.C. 20006. The Institute has approximately 65 member companies in the United States which employ over a half million people and produce more than 95% of the steel made in America.

The Institute's member companies are subject to opacity standards similar to those involved here under the Administrator's Standards of Performance for Steel Plants: Electric Arc Furnaces, 40 C.F.R. § 60.270 *et seq.*, 40 Fed. Reg. 43850 *et seq.*, September 23, 1975. Thus, the Institute's members will be directly affected by this Court's determinations on the opacity questions presented herein.

While the Institute supports the Portland Cement Association's petition with regard to all of the questions presented for review, this brief will discuss only the opacity-related questions. The Institute believes that these issues present important questions of Federal law which have not been, but should be, settled by this court.

ARGUMENT

I. Opacity Standards Have a Pervasive Impact on Industry.

Under section 110 of the Clean Air Act the states are required to adopt and submit to the Environmental Protection Agency ("EPA") implementation plans to assure that all national primary and secondary ambient air quality standards will be attained. Section 110 of the Act is an exceedingly vague delegation of power: it does not prescribe how an ambient air quality standard is to be attained or enforced. Thus the states look to EPA, which is charged with reviewing all state implementation plans, for guidance as to the substance of the plans. Following EPA's own

practice, the states use opacity standards to enforce the implementation plans,[1] and they commonly use EPA's Reference Method 9 as the test method for opacity. Thus, this Court's determinations with regard to opacity in general, in Reference Method 9 in particular, will have an impact on every industry subject to state implementation plan emission limitations under the Clean Air Act.

II. This Court Should Review the Administrator's Regulations To Determine Whether the Opacity Provisions Contained Therein Violate Due Process of Law.

The "opacity" of a smoke plume refers to the amount of light it blocks rather than the amount of pollution it contains. A plume of smoke containing less pollution than another can appear to have greater opacity depending upon such factors as the size of the smokestack, the size and shape of the particles, the amount of condensed water vapor in the plume, wind speed and other atmospheric conditions (such as inversions), and the contrast between the color of the smoke and the color of the sky (or whatever serves as the background for the opacity observation). The Administrator admits that all of these factors affect opacity readings.[2]

Moreover, even holding those factors constant, the record shows that visual opacity readings by EPA-certified observers are highly inaccurate. The prestigious, independent American Society for Testing and

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[1] Analysis of Final State Implementation Plans—Rules and Regulations U.S. EPA (Office of Air Programs) Publication APTD 1334 (1972), at 51.

[2] See 39 Fed. Reg. 39874 (November 12, 1974); and "Excerpts From EPA Response to Remand," Petition For a Writ of Certiorari, A-90-96.

Methods ("ASTM") whose tests are often used by EPA, has studied the accuracy of visual opacity determinations (ASTM Pub. DS 55-S10, 1974) using readings by seven EPA-certified observers. ASTM concluded:

> . . . smoke readings by a single observer are not precise enough to provide very good control of visible emissions: therefore, single readings are not very reliable for enforcement purposes when regulatory controls are strict. "Smoke Readings Vary with Observers," Electrical World, 1-15-75.[3]

EPA defended the accuracy of its test method in the Court below by citing studies that EPA itself conducted to validate its own test procedure. These tests averaged sets of observational errors made by multiple observers which, as ASTM noted, allows observers who make low readings to cancel out those who make high readings. Nonetheless, a 7.5% opacity error was found. Unfortunately, actual tests are based on readings made by only one observer, so the "averaging" method employed by EPA to "prove" its test method is more accurate than the actual test employed.

In addition, EPA's certification procedures are inadequate. Observers attending "smoke school" are shown calibrated plumes of known opacity before they take the certification test, and they may retake the test until they pass it. Thus, passing a smoke school test is easier than making an accurate field reading.

The foregoing facts raise substantial issues of law concerning the opacity provisions under review.

First, opacity cannot be used as a standard under the Clean Air Act because it is unrelated to the amount of

[3] The Bureau of Standards of the U.S. Department of Commerce has reached a similar conclusion. 39 Fed. Reg. 37466, October 21, 1974.

pollution emitted—the only factor recognized by EPA to be related to protecting the public health and welfare under the Act. In fact, EPA does not even attempt to justify its opacity standard on this basis, but rather on the ground that opacity standards will be set at a level which will correspond to violations of the mass emission standards.[4]

But EPA's method of setting opacity standards as a test for mass emission limits cannot be sustained. First, even assuming that EPA is capable of accurately equating opacity limits to mass emission limits on a plant-by-plant basis,[5] the record indicates that changes in average particle size as well as changes in atmospheric conditions (especially inversions) will render nugatory any such calibration. That fact, in addition to the inherent inaccuracy of the opacity test itself indicates that the opacity regulations under review here violate the many decisions of this Court which have consistently held that when a requirement directly related to a statutory purpose (here, mass emission limits) is measured by reference to a test which is not directly related to the statutory purposes (here, the opacity standard) then that purported relationship must be "necessarily or universally true in fact." Vlandis v. Kline, 412 U.S. 441, 452 (1973). Accord, Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632 (1974); U.S.D.A. v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). The constitutional infirmity of EPA's opacity test is exacerbated by the fact that the test is

[4] Petition for Certiorari, A-64-65, 90.

[5] 40 C.F.R. § 60.11, 39 Fed. Reg. 39872 et seq., November 12, 1974.

performed without notice to the operator of the source. Lack of notice renders the subjective observations of the test observer irrefutable, because the only way to confirm or deny an opacity observation is through another opacity observation from the same location at the same time. Lack of notice of the opacity test eliminates any possibility of a meaningful hearing on the purported opacity violation. For this reason, one court has held that the absence of notice violates due process of law. Western Alfalfa Corp. v. Air Pollution Variance Bd. 510 P.2d 907 (Colo. App. 1973), rev'd. on other grounds, 416 U.S. 861. See Armstrong v. Manzo, 380 U.S. 545 (1965).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition For a Writ of Certiorari submitted by the Portland Cement Association.

Respectfully submitted,

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